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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 946.

FRANK VELOTTA,
Petitioner,

vs.

JAMES J. McGETTRICK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed without writing an opinion. The Ohio Supreme Court refused to certify and review.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

STATEMENT OF THE CASE.

Frank Velotta, the petitioner herein, along with James Colavecchio and Pasquale Cisternino, was charged in Palm Beach County, Florida, with breaking and entering the Publix Super Market, Inc., located on the South Dixie Highway, in West Palm Beach, on February 16, 1964. Velotta fled Florida immediately thereafter and returned to Cleveland. The Governor of Florida submitted to the Governor of Ohio an executive requisition demanding the inter-state rendition of Velotta. After a hearing in the offices of the Governor of Ohio, the Governor determined that the demand for extradition should be complied with and signed a warrant for Velotta's arrest. A hearing was had before the trial court on the fugitive warrant, after which Velotta filed a petition for a writ of habeas corpus. At the hearing on the petition, counsel for the petitioner stated that the petitioner contends that he was never a resident of the County of West Palm Beach, Florida, never a fugitive, and that he was not present in that county at or about the time indicated. At the conclusion of the testimony and arguments of counsel, the court ordered Velotta surrendered to the Florida authorities. Upon appeal to the Eighth District Court of Appeals, the judgment of the trial court was affirmed.

The testimony the State offered at the hearing to establish that the defendant Frank Velotta was in the State of Florida and in the county where the crime was alleged to have occurred at or about the time alleged is substantially as follows:

Richard Lee Sheets, a patrolman for the City of West Palm Beach, Florida, went on duty at 11:00 p.m. on the night of February 15, 1964. That night he saw Frank Velotta under circumstances he described as follows (R. 18):

"I had first observed a vehicle drive from a shopping center on the south end of our city, * * *

"The car drove from the shopping center, from the south end of our city, and I fell in behind, and I observed that it was a rental type from Duval County, Jacksonville, Florida—and three white males—and I followed them for about nineteen blocks, where I stopped them for investigation."

Patrolman Sheets had the car stopped for exactly eleven minutes. (R. 33.) He asked them their names and learned they were Pasquale Cisternino, James Colavecchio, and Frank Velotta. Velotta, whom the patrolman identified in the courtroom, was sitting in the right front passenger's seat. When asked his name and where he lived, Velotta said he was from Cleveland and said he was Frank Velotta. (R. 19.)

On cross examination, officer Sheets was asked if he saw some photographs of Velotta. He answered that he had seen some photographs—he was not certain whether six or seven—shown him on February 24 by Det. Lt. Baumboughton. He identified Velotta on one of the photographs. When he questioned the three men he wrote down the names of Cisternino and Colavecchio but he did not write down Velotta's name. Cisternino was driving and Colavecchio was supposed to have made the rental agreement for the car. He spent a few minutes talking with Velotta at that time. The place where he stopped the car was on the main street of the town and was a well lighted area directly in front of a supermarket. (R. 27.)

William Earl Martin, a police officer for the City of West Palm Beach, was on duty from approximately 8:30 p.m. on February 15 to 4:30 the next morning, driving a special detail run. He identified Frank Velotta as the person he had seen in the course of his duties at approxi-

mately 12:25 a.m. inside a hatch on the roof of the Publix Super Market. The hatch was about four feet square and was located at about the middle of the roof of the Super Market, about eight feet from the rear wall. Officer Martin lifted the hatch preparatory to going down inside. Looking down, he saw Frank Velotta about three feet from the top of the hatch on the ladder that leads to the inside of the store from the roof. The officer jumped back and drew his gun, then stepped to the hatch again. Velotta was gone. The officer had spotlights shining down the hatch and when he saw Velotta down in the hatch the spotlights were on Velotta. Colavecchio was found lying on his side about 300 feet away on the roof of the shopping center.

ARGUMENT AND LAW.

The petitioner claims that the trial court erred in refusing to "weigh" the evidence presented at the hearing on the petition for habeas corpus to determine whether the petitioner was in fact in the demanding state (Florida) at or about the time stated in the indictment.

The trial court heard the testimony of a number of witnesses presented by the petitioner in his attempts to prove that he was not a fugitive from justice, that he was in Cleveland, Ohio, when the crime was committed. The petitioner's evidence was directly in conflict with the testimony of the two Florida officers that each of them had seen the petitioner in that city at or about the time indicated, one of the officers even placing him at the scene of the crime. Both officers unequivocally identified the petitioner in the courtroom as the man they saw. The testimony of the petitioner, his wife, and various close relatives and friends that he was at a birthday celebration in Cleveland on the evening of February 15, 1964, therefore presented only a question of alibi.

The trial court noted that the scope of the inquiry in habeas corpus proceedings upon extradition is defined in *In re Harris*, 170 Ohio St. 151, as follows:

> "In each instance, the Governor and the court shall inquire and determine (1) whether an offense is charged under the laws of the state demanding extradition, (2) whether the identity of the party charged is established, (3) whether the party charged is a fugitive from justice * * * and (4) whether the extradition is not for the purpose of enforcing any civil liability."

In denying the application for habeas corpus the court determined that the sole question here is whether the

identity of the defendant has been established, and that there is substantial credible evidence to that effect.

The refusal of the trial court to weigh the evidence of the defendant directed to proving an alibi is in accord with the authoritative pronouncements holding that the court, in habeas corpus proceedings upon extradition, is not required to determine the question of alibi. The scope of the judicial review of a decision of the Governor is stated in *Biddinger v. Commissioner of Police*, 245 U. S. 128, 62 L. ed. 193, at pp. 135-136:

> "This much, however, the decisions of this court make clear, that the proceeding is a summary one, to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest; that when the extradition papers required by the statute are in the proper form the only evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed; and, frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding state."

The Ohio decisions and statute follow the general rule, from which we can find no dissent, that absence from the scene of the crime or an alibi cannnot be shown unless it is probative of the fact that the accused is not a fugitive. Section 2963.18 of the Ohio Revised Code provides:

> "The guilt or innocence of an accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after a demand for extradition accompanied by a charge of crime under section 293.03 of the Revised Code has been presented to the governor, except as it may be involved

in identifying the person held as the person charged with the crime."

The following decision in *In re Mainer, Appellant, v. State, Appellee,* 92 Ohio Law Abs. 251, 194 N. E. 2d 167 (1961) (appeal from denial of a writ of habeas corpus) summarizes and determines issues similar to those presented in the petition herein:

> "Whether or not the petitioner has sufficient evidence to prove an alibi is not for this court to pass upon for the reason that an alibi, if proven, will not warrant the discharge of the petitioner; nor is it the province of this court to pass upon the merits of this case as to the guilt or innocence of the petitioner. The evidence relative to absence of the petitioner from the demanding state at the time of the alleged crime is in conflict, and under all the evidence the trial court determined the question adversely to the petitioner.
>
> "The sole question before us is whether the Governor of the State of Ohio upon whom demand has been made is authorized to grant extradition of the petitioner upon the request of the Governor of the State of Pennsylvania under all these facts.
>
> "Clearly the Governor of Ohio under the papers before us had jurisdiction to issue the warrant. It appears that the claim is that a crime has been charged which in this state is a felony, and there is sufficient credible evidence of the identity of the petitioner, and that he is a fugitive from justice from the demanding state.
>
> "Upon careful review of the orders and judgment of the common pleas court in refusing to discharge on writ of habeas corpus the petitioner who is held in extradition proceedings this court is of the view that there is credible evidence in the record warranting the court's action, and for that reason the judgment of the court of common pleas is affirmed."

CONCLUSION.

In this case the requirements of a judicial inquiry on the subject under consideration were fully met. The petitioner was given an opportunity to be heard and to submit evidence in his behalf. The decision of the trial court, wherein the court denied the application for habeas corpus, was supported by substantial probative evidence establishing the identity of the petitioner.

The petitioner has not shown any deprivation of his constitutional right to due process of law entitling him to review by this Court. The writ should therefore be denied.

Respectfully submitted,

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